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HOUSE BILL 3027

By Whitson

AN ACT to amend Tennessee Code Annotated, Title 12, Chapter 3 and Sections 12-4-109 and 12-4-110 regarding State contracts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 12-3-203 is amended by adding the following sentence at the end of subsection (b):

Submission of a bid shall not create rights, interests, or claims of entitlement in any bidder, including the lowest apparent bidder.

SECTION 2. Tennessee Code Annotated, Section 12-3-203 is amended by adding the following sentence at the end of subsection (e):

Notification by the state of intent to award shall not create rights, interests, or claims of entitlement in any bidder.

SECTION 3. Tennessee Code Annotated, Section 12-3-214(a) is amended by deleting subsection (a) in its entirety and by substituting instead the following:

(a) *Right to Protest.* Prior to the commencement of an action in court concerning the controversy, any actual bidder who claims to be aggrieved in connection with a bid,

the bid process, or a pending award of a contract may protest to the commissioner. The protest shall be submitted in writing within seven (7) days after such claimant knows or should have known of the facts giving rise to the protest. Any issues raised by the protesting party after the seven(7) day period shall not be considered as part of the protest. In the case of a pending award, a stay of award in accordance with subsection (c) may be requested.

SECTION 4. Tennessee Code Annotated, Section 12-3-214 is amended by adding the following new subsection following subsection (a) and renumbering the subsequent subsections accordingly:

( ) *Signature on Protest Constitutes Certificate.* The signature of an attorney or protesting party on a request for consideration, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. If a request for consideration, protest, pleading, motion, or other document is signed in violation of this subsection before or after appeal to the board of standards, the board of standards, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, including the affected state department or agency, the amount of the reasonable expenses incurred because of the filing of the protest, a petition for a stay of award, pleading, motion, or other paper, including reasonable attorneys' fees.

SECTION 5. Tennessee Code Annotated, Section 12-3-214(b)(2) is amended by deleting the words “ten(10)” in the second sentence of the subsection and by substituting instead the words “seven (7).

SECTION 6. Tennessee Code Annotated, Section 12-4-109(a)(1) is amended by adding the following new subsections following subsection (A) and by renumbering the subsequent subsections accordingly:

( ) Submission of a proposal shall not create rights, interests, or claims of entitlement in any proposer, including the best evaluated proposer.

( ) Whenever the head of the affected department or agency proposes to reject all proposals for a certain purchase, such action shall be taken only for the following reasons:

(i) Unreasonably high prices or failure of all proposals to meet technical specifications;

(ii) Error in the request for proposals;

(iii) Cessation of need;

(iv) Unavailability of funds;

(v) A determination by the affected department or agency that proceeding with the procurement would be detrimental to the best interests of the State, the reason for which must be documented and approved by the Commissioner of Finance and Administration and filed with the Comptroller of the Treasury.

( ) The commissioner of finance and administration is authorized to purchase for any department or agency of the executive branch of state government in the open market, personal services, professional services or consultant services for immediate delivery to meet emergencies arising from unforeseen cause, including, but not limited to, delays by contractors, delays related to protests and acts of God. The authority to so purchase may be delegated by the commissioner of finance and administration to any department or

agency of the executive branch of state government; provided that a report on the circumstances of any such emergency and the activities of such department or agency thereunder shall be transmitted in writing as soon as possible by such department or agency to the commissioner of finance and administration, which report shall set forth the prices at which such services were purchased and the total amount of the purchase thereof. All emergency purchases shall, if practicable under the circumstances, be made on the basis of a competitive process. All emergency purchases shall be made by a contract document in accordance with personal service, professional service and consultant service contracts regulations.

SECTION 7. Tennessee Code Annotated, Section 12-4-109(a)(1)(B)(i) is amended by deleting that subsection in its entirety and by substituting instead the following:

(i) Any actual proposer who claims to be aggrieved in connection with a specific solicitation process authorized under this section may protest to the head of the affected department or agency. The protest shall be submitted in writing within seven (7) days after such claimant knows or should have known of the facts giving rise to the protest. Any issues raised by the protesting party after the seven (7) day period shall not be considered as part of the protest.

SECTION 8. Tennessee Code Annotated, Section 12-4-109(a)(1)(B) is amended by inserting the following new subsections immediately following subsection (i) and by redesignating subsequent subsections accordingly:

(ii) Signature on Protest Constitutes Certificate. The signature of an attorney or protesting party on a request for consideration, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. If a request for consideration, protest, pleading, motion, or other document is signed in violation of this subsection before or after appeal to the review committee, the review committee, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, including the affected state department or agency the amount of the reasonable expenses incurred because of the filing of the protest, a petition for a stay of award, pleading, motion, or other paper, including reasonable attorneys' fees.

(iii) Neither a protest nor a stay of award shall proceed under this section unless the protesting party posts a protest bond. The protesting party shall post, with the head of the affected department or agency, at the time of filing a notice of protest, a bond payable to the state of Tennessee in the amount of five percent (5%) of the lowest cost proposal evaluated. Said protest bond shall be in form and substance acceptable to the state and shall be immediately payable to the state of Tennessee conditioned upon a decision by the review committee that:

1. a request for consideration, protest, pleading, motion, or other document is signed, before or after appeal to the review committee, in violation of subsection (a)(1)(E)(ii);
2. the protest is frivolous;
3. the protest has been brought or pursued in bad faith; or
4. the protest does not state on its face a valid basis for protest.

The state shall hold said protest bond for at least eleven (11) calendar days after the date of the final determination by the head of the affected department or agency. If the protesting party appeals the determination in accordance with *subsection*

(a)(1)(E)(vii), the head of the affected department or agency shall hold said protest bond until instructed by the review committee to either keep the bond or return it to the protesting party.

( ) At the time of filing notice of a protest of a procurement in which the lowest evaluated cost proposal is less than \$1,000,000.00, a minority or small business protesting party may submit a written petition for exemption from the protest bond requirement of section (a)(1)(E)(iii). Such a petition must include clear evidence of minority or small business status. On the day of receipt, the petition shall be given to the commissioner of finance and administration or the commissioner's designee. The commissioner of finance and administration or the commissioner's designee shall have five (5) business days in which to make a determination. If an exemption from the protest bond requirement is granted, the protest shall proceed as though the bond were posted. Should the commissioner of finance and administration deny an exemption from the requirement, the protesting party shall post the protest bond with the head of the procuring state agency as required in section (a)(1)(E)(iii) within three (3) business days of the determination. For purposes of this section, a minority business shall be defined as solely owned or at least 51% owned by a person or persons who control the daily operation of such business and who is disabled (persons having a physical or mental impairment that in the written opinion of the person's licensed physician, substantially limits one or more of the major life activities of such person, including caring for oneself, and performing manual tasks, which include writing, walking, seeing, hearing, speaking and breathing); African American (persons having origins in any of the Black racial groups of Africa), Asian American (persons having origins in any of the original peoples of the Far East, Southeast Asia and Asia, the subcontinent, or the Pacific Islands), Hispanic American (persons of Cuban, Mexican, Puerto Rican, Central or South American, or other Spanish or Portuguese origin, culture, or descent, regardless of

race,); or Native American (persons having origins in any of the original peoples of North America). For purposes of this section, a small business shall be defined as one which is independently owned and operated, has total gross receipts of no more than \$2,000,000.00 for the most recently ended federal tax year, and employs no more than 30 persons on a full-time basis.

SECTION 9. Tennessee Code Annotated, Section 12-4-109(a)(1)(B)(iv) is amended by deleting the subsection in its entirety and by substituting instead the following:

(iv) The protesting party may request that the final determination of the head of the affected department or agency be considered at a meeting of a review committee that is composed of the commissioner of general services, the commissioner of finance and administration, and the comptroller of the treasury, or their designees. The request for consideration shall be made in writing to the committee within seven days from the date of the final determination by the head of the affected department or agency.

SECTION 10. Tennessee Code Annotated, Section 12-4-110(a) is amended by deleting subsection (a)(6) in its entirety.

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect upon becoming a law, the public welfare requiring it.